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Gary J. Xanthos v. Board of Adjustment of Salt Lake City : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT

OF THE STATE OF UTAH

GARY J. XANTHOS, Plaintiff and Respondent, vs. BOARD OF ADJUSTMENT OF SALT LAKE CITY, Defendant and Appellant.	)	Case No. 18333

BRIEF OF APPELLANT

Appeal from order of the Third Judicial District Court for Salt Lake County, Honorable Kenneth Rigtrup, presiding

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NATURE OF THE CASE

This appeal is from a final judgment overruling the Salt Lake City Board of Adjustment's refusal to grant Plaintiff-Respondent-Xanthos, hereinafter "Respondent", a zoning variance.

DISPOSITION IN LOWER COURT

The Lower Court admitted certain evidence not presented to the Board of Adjustment and conducted the appeal as a de novo trial, in effect denying the Board's Motion in Limini. It assumed the prerogative of independently reweighing and balancing interests. The court, also, verbalized its position that it had authority to substitute its judgment for the Board of Adjustment.

Based upon the Court's new independent findings and conclusions, judgment was entered that Respondent was entitled to a variance from the Board. This ruling legalized a structure, believed originally to have been built as a garage, and permitted

its continued use as a single-family dwelling. The Lower Court ordered the Board to grant the variance and reimburse the Respondent his costs.

RELIEF SOUGHT ON APPEAL

Appellant Board, on behalf of itself in this case and for the benefit of all municipal boards of adjustment throughout this State, seeks a reversal of the Lower Court. Specifically, it seeks rulings from this Court:

1. Ruling that judicial review of Boards of Adjustment under Section 10-9-15, U.C.A., 1953, is under the court's constitutional and statutory appellate jurisdiction and does not authorize a trial de novo on the merits.

2. Overturning the Lower Court's judgment by holding it erred as a matter of law, by: (a) failing to limit its scope of review to determine if Board's decision was supported by credible evidence; (b) failing to give Board's findings and decision a presumption of validity and impose the burden of proof to establish error by clear and convincing evidence; (c) substituting its own philosophy and judgment for the Board's; and (d) granting a judicial variance because of economic hardship, when that variance grants the site a privilege no other property or owner in the City enjoys as a matter of right and when the effect is contrary to the spirit of zoning ordinances and public interest.

3. Affirming the Board's decision as being adequately supported by the credible evidence, even though reasonable per-

sons might differ on the dispute's resolution.

STATEMENT OF THE FACTS

A. Official Administrative Action Challenged.

1. Respondent, Gary J. Xanthos, submitted a formal request to the Board of Adjustment for a zoning variance on February 1, 1979 in Board Case No. 7928. The variance requested legalization of the use of an old structure in the northwest corner of the Xanthos property as a single-family dwelling. (R-10, 166, 168)

2. When the structure in question is used as a dwelling unit (on the same site where eight new units were constructed by Respondent's father), it lacks: frontage upon a dedicated street; required front, rear and side yards; minimum square footage for the design; and miscellaneous compliance with City zoning laws applicable to the site, such as parking, light and open space, identification, access to emergency service, and the ability to stand as an independent building site, etc. (R-255-56, 259, 311-12, 321, 330-31, 346, 350-51, 394-97, 408, 418).

3. Had the desired variance been granted by the Board, it would have legalized the continued independent use of a small structure as a dwelling, which was probably illegally converted from a garage and is now located behind a series of four duplexes. (See, Exs. 13D and 21D, Part 2, in App.Ex.1 & 2)

4. Respondent justified his request for a variance on the grounds that the use of the structure as a dwelling was non-conforming and/or that it existed in 1974 when James Xanthos applied

for and received approval to construct the duplexes, without any requirement of record to remove the structure. Thus, he argued that strict enforcement by the City some four years later, created an unfair and unnecessary hardship. (R-11).

5. Respondent's request was initially considered before the Board at public hearing conducted February 26, 1979. At this time, he was represented by counsel, Mr. Rappaport. The minutes contained in the Board's Findings and Order reflect the Board was given background information and counsel presented his client's case. Neighbors, Mr. Xanthos and others offered testimony on various aspects of the case. (R-12-3; 37-8; App.Ex.3)

6. After considering the testimony and evidence presented the Board concluded the variance was not justified. It ruled that while the violation of using the structure as a dwelling unit should have been discovered and conformity required at the time of approval or during the construction of the duplexes, the structure can remain and comply with applicable ordinances if it is not used as a dwelling (App.Ex.3).

B. Facts Relating to Construction of Four Duplexes.

7. In 1974, James Xanthos's agent applied for and received a permit to construct four single story duplexes, with detached parking on 32,195 square feet of land. The application, plot plan and building plans were submitted to the City. The City relied on said matters in granting the permit. The application affirmatively stated that the land was presently "vacant" and

without any dwelling units thereon. The plat plan showed an "existing building", but made no reference to it being a dwelling unit. The City approved the duplexes' building permit based on the assumption that the structure in controversy was not going to be used as a dwelling. (R-224A-226; 232, 235-6, 256, App.Ex. 1&2)

8. Had the plan been considered as one to accommodate nine units, it would have violated several applicable zoning ordinances, including: lack of frontage on a dedicated street; inadequate lot and yard areas; parking; and the ability of each building-site to stand alone to independently comply with ordinances. (R-227, 255-6, 296-7).

9. Neither the City's nor the owner's approved set of plans could be located for verification or notation of conditions. (R-142, 219-20, 254).

10. James Xanthos proceeded with construction of the four duplexes during the period of 1974-75; and inspections were made by City building and specialty inspectors. (R-221-4). After a request for a certificate of occupancy ("C.O.") in April of 1975, final inspections were completed. (R-233)

11. Respondent's copy of the "C.O.'s" bears no notations of written conditions; although, the building inspector of at least one unit, Marvin Peguillan, testified that as a very new inspector, he inquired of his supervisor Mark Lawson, about the rear building. He was informed the old building was going to be torn down. (R-388) Consequently, he signed off for the final inspec-

tion on September 30, 1975, but made no notation on the C.O. of the uncompleted condition of removal of the structure. (R-384-90)

12. The Board noted that the violations of the structure's use as a dwelling should have been caught or resolved during construction. However, it did not find that the inaccurate application, misleading plans or ineffective resolution of zoning violations during construction constituted "special circumstances" which attached to the property under Section 10-19-12(3) (a) U.C.A. It did find that the loss of rental income was not a hardship justifying a variance. (App.Ex.3, R-38; copies of Sections 10-9-12 and 10-9-15, U.C.A., 1953 are reproduced as App.Ex.4).

13. The Lower Court disregarded the Board's finding and rationale. In its Amended Findings of Fact, the Court reviewed these facts, but infers a duty upon the City to detect and resolve zoning violations during plan review or construction. Failing that duty, the Court held the City creates "special circumstances" entitling the property owner to a variance, legalizing zoning violations. (Paras. 15-19, 21, App.Ex.5; R-111-13).

C. History of the Site.

14. Use of the then old-appearing structure as a dwelling was documented back to 1942, some 15 years after City zoning was adopted in 1927. (R-203, 215, App.Ex.5; R-111)

15. The Lower Court then found that the usage in 1942 and the age of the structure were special circumstances justifying the variance. (R-113)

16. The structure has never been an independent residence, according to records on file in the City. (R-231; Ex's 21D, 28D, 29D and 30D; cf. R-155, 252, 211). It was and is not visible the Street; has no mailing address, identification or access from a public road; and had been remodeled, without permits since the Xanthos family acquired it in 1972. Further, the only primary structures approved by the City for the site, for which water and sewer services were authorized prior to construction of the four duplexes, were removed by James Xanthos, his family and others without permit. (R-182, 207, 211, 321, 363-4, 369, 377 and Ex. 21D part 1, 28D and 29D) In addition, Xanthos contributed to the confusion by deviating from the official addresses which had been assigned to the duplexes. (R-318-9; 337-8)

D. Positions of Board and Lower Court

17. The Board found, among other things that: (1) The builder represented that all he expected to have on the site, after the construction, was eight units; (2) The ordinances would not allow, anywhere in the City, dwellings to be constructed in front of others, as a matter of right; and (3) The granting of the desired variance would legalize and ensure the continuation of a dwelling that does not have the required street access, identification, yard areas, landscaping, open space and other amenities the ordinances are intended to require and provide.

18. The Board, in exercising its statutory duty to balance the spirit and intent of the ordinances against the effect and

the ability to comply, found the variance unjustified. (R-13, 382-8, App.Ex.3).

19. In its review of the case, the Lower Court disregarded the Board's reasoning and substituted its own. It assumed the responsibility and prerogative to independently balance the public interest, represented by compliance with City law, as opposed to the landowners private interests or benefits served by granting a variance. (R-345-6; 355-9). The Lower Court held:

> "5. Plenary action relief constitutes a complete review of the Board of Adjustment's decision by trial de novo and the Court has the same power as the Board of Adjustment to review the facts." (R-113; App.Ex.5).

ARGUMENT

POINT I

> THE LOWER COURT ERRED IN REVIEWING AN APPEAL FROM A BOARD OF ADJUSTMENT DECISION BY DEPARTING FROM APPELLATE JURISDICTION AND CONDUCTING A TRIAL DE NOVO. RATHER, THE COURT'S JURISDICTION IS LIMITED, UNDER SECTION 10-9-15 UTAH CODE ANN., TO DETERMINE: (A) WHETHER THERE EXISTED CREDIBLE EVIDENCE TO SUPPORT THE BOARD'S DECISION, AND (B) WAS THE BOARD'S DECISION ARBITRARY, CAPRICIOUS OR UNLAWFUL.

The Lower Court denied a Motion in Limini and declined to limit its scope of review and evidence in an appeal under Section 10-9-15 of a city Board of Adjustment zoning decision. It assumed the prerogative to independently retry, reweigh and balance interests. It candidly stated of its judicial role in such a case as follows:

> "5. Plenary action relief constitutes a complete review of the Board of Adjustment's decision by

trial de novo and the Court has the same power as the Board of Adjustments to review the facts." See Facts 5, App.Ex.5, R-113.

Said conclusion reflects the court's erroneous decisions that: (1) The scope of review was not appellate, but rather de novo in nature and not a trial limited to a review of the issues or evidence presented to the Board; (2) There is no presumption of validity to zoning administrative decisions; and (3) A Utah District Court is free to substitute its judgment for that of the zoning Board of Adjustment, even where reasonable parties might differ over the reasonableness of the original decision.

A. SECTION 10-9-15 DOES NOT CHANGE THE APPELLATE NATURE OF THE COURT'S JURISDICTION OVER ADMINISTRATIVE ZONING TRIBUNALS NOR THE SCOPE OF JUDICIAL REVIEW.

Courts are given two types of jurisdiction under Section 7, Article VIII, of the Utah State Constitution. Here they are given appellate jurisdiction and supervisory control over all inferior courts and tribunals. This provision recognizes that the courts may need to utilize the common law equitable writs to perform this appellate responsibility. Such writs, particularly certiorari, were traditionally used to invoke the judiciary's limited appellate review to challenges of abuse of discretionary powers given to inferior statutory bodies, where statutes do not expressly provide a remedy for judicial review.

However, in our case a statute does exist which reads:

"Judicial review of board's decision -- Time limitation. The city or any person aggrieved by any decision

> of the board of adjustment may have and maintain a plenary action for relief therefrom in any court of competent jurisdiction; provided, petition for such relief is presented to a court of competent jurisdiction within thirty days after the filing of such decision in the office of the board." 10-9-15 Utah Code Ann., 1953.

This statute has three purposes: (1) Require the petition for judicial appellate review be filed timely, as a 30 day statute of limitation; (2) Fix as an ascertainable event to trigger the commencement of the limitation period, the date of filing the decision in the board's office; and (3) Clarify that the reviewing court is not confined to the certified record to review the action, but all evidence presented to the Board as shall be more fully discussed below in Point B.

These functions were not provided under the Utah Rules of Civil Procedure, hereinafter "U.R.C.P.", dealing with extraordinary writs.[1] Rather, prior to 1972 and the adoption of Rule 81(d), U.R.C.P., if the legislature had desired to fix a predictable short statute of limitation, it would have had to pass such a statute.[2] Thus, City submits that the purpose of Section 10-9-15 U.C.A. was to supplement the common law certiorari process of invoking appellate review under Rule 65(b), by estab-

[1]Rule 65(b), Utah Rules of Civil Procedure.

[2]Utah Chiropractic Association, Inc. v. Equitable Life Insurance Society of the United States, 579 P.2d 1327 (Utah 1978) explains Rule 81(d) adopted in January 20, 1972 combine with Rule 73 to require administrative appeals to be filed within one month.

lishing a predictable statute of limitation and allowing evidentiary proof of matters presented to the Board. It was not to confer a new source of original jurisdiction to the trial courts.

The respected treatise on municipal law succintly summarizes the law concerning the scope of appellate judicial review of zoning boards, including boards with power to grant variances as follows:

> . . ."In other words, the scope of judicial review and inquiry is limited to whether the determination of the zoning board is unreasonable, arbitrary or an abuse of discretion on the facts or is an illegal error. And the reviewing court is required to consider the evidence most favorable to the decision of the zoning authorities." 8A McQuillan, Municipal Corporations §25.334 at p. 472 (Emphasis added).

Utah courts have not expressly addressed the issue on cases arising under a board of adjustment; however, this court has applied this same standard of limited appellate review in other zoning matters, which Appellant submits should be dispositive. A concise summary of the general rules applicable in review of zoning cases has been rendered by this Court in the 1979. Here, a challenge was brought by a citizen group contesting the administrative act of the County in issuing a special conditional use permit to allow construction of a large apartment complex after modification of a plan earlier rejected. Before addressing specific factual issues, this Court states the rules for judicial review of zoning decisions as follows:

> "In addressing the plaintiff's attack upon the judgment, there are certain rules to be considered. Due to

the complexity of factors involved in the matter of zoning, as in other fields where the courts review the actions of administrative bodies, it should be assumed that those charged with that responsibility (the Commission) have specialized knowledge in that field. Accordingly they should be allowed a comparatively wide latitude of discretion; and their actions endowed with a presumption of correctness and validity which the courts should not interfere wtih unless it is shown that there is no reasonable basis to justify the action taken." Cottonwood Heights Citizen Ass'n v. Bd. of Comm. of S.L.Co., 593 P.2d 138, 140 (Utah, 1979).

By so doing, the court has clearly extended to zoning administrative cases the general rules of limited appellate review. See also, Gayland v. Salt Lake County, 11 U.2d 307, 358 P.2d 633, (1961) (denial of rezoning to commercial); Naylor v. Salt Lake City Corp., 17 U.2d 300, 410 P.2d 764 (1966) (rezoning from "R-6" to "B-3"), Crestview-Holladay Homeowners Assoc., Inc. v. Engh Floral Corp., 545 P.2d 1150 (Utah 1976) (rezoning from agriculture-residential to commercial).

In a case where issues are virtually identical to the one before the bar, our sister State Wyoming has ruled specifically that Board of Adjustment decisions are presumptively valid and subject of only limited judicial review. The Wyoming court held that the existence of a statutory remedy or "appeal" does not change the limited scope of appellate review otherwise available by extraordinary writs in board of adjustment litigation. Williams v. Zoning Adjustment Board of the City of Laramie, 383 P.2d 730 (Wyo. 1963).

In the Williams case, a Board granted a variance to permit

the rebuilding and enlarging of a nonconforming building, which decision was contested. One of the issues was the scope and procedure for such reviews. The plaintiff argued the court should conduct a "trial de novo" where the court would rehear all the evidence and redecide the case on the merits, even though the statutory remedy did not specifically mention a trial de novo.[3]

Judge McIntyre noted that the powers of the court, upon review under a statute were of the same effect as those under the extraordinary writ process. He rejected the plaintiffs' argument that an "appeal" made any substantive difference in the scope of review and explained the distinction between the process of invoking judicial jurisdiction over an administrative action as opposed to the type of jurisdiction - be it original or appellate.

> "In these quotations the term 'appeal', as used in statutes similar to §15-626, was characterized as only a means of getting the controversy before a court; not as an appeal in the sense of a transfer of jurisdiction from one court to another, but simply a process, under the misleading name of appeal, for invoking the judicial power to determine a legal injury complained of; as a mode of removing the cause from an administrative to a judicial tribunal, when it is claimed a legal right has been denied; and as an original application to a court to exercise its 'judicial' power in respect to acts done by the administrative tribunal in excess of its power, or in the unlawful abuse of that power."
>
> "We find nothing in the opinion of Judge Riner which would suggest that the trial in district court, on appeal from an adjustment board, should be a trial de

[3]Section 10-9-15 similarly does not mention trial de novo.

novo. On the contrary, it seems clear to us the decision in the McInerney case contemplated as the statute does, that the court has only the duty to review for the purpose of determining whether the acts done by the administrative tribunal were in excess of its power, or in the unlawful abuse of that power. In the event the action complained of should be found to be arbitrary, or illegally exercised, then and only then would the court vacate, reverse, correct or modify." Id. at 732 (Emphasis added).

This case is directly on point and supported by board of adjustment cases from other jurisdictions.[4]

The existence of Section 10-9-15 could arguably remove a request for judicial review out of the scope of Rule 65(b)(2).[5]

[4]For other cases from other jurisdictions supporting the limited appellate scope of judicial review to board of adjustment decisions see City of Baltimore v. Borinsky, 239 Md. 611, 212 A.2d 508 (Md.App. 1965) (denial of use variance to build office in residential zone); Siller v. Board of Supervisors of City and County of San Francisco, 25 Cal. Rptr. 73, 375 P.2d 41 (1962) (challenge to Planning Commission's grant of variance to reduce off street parking); Levy v. Board of Adjustment of Arapahoe County, 141 Col. 493, 369 P.2d 991 (1962) (denial of variance to reduce acreage per lot); Eason Oil Company v. Uhls, 518 P.2d 50 (Okla., 1974) (denial of use variances to permit oil drilling in nondrilling areas); Monte Vista Prof. Bldg. v. City of Monte Vista, 531 P.2d 400 (Colo. App. 1975) (contesting conditions of variance granted); Whitcomb v. City of Woodward, 616 P.2d 455 (Okl.App., 1980) (denial of use variance); Rickard v. Fundenberger, 1 Kan.App.2d 222, 563 P.2d 1069 (1977) (contesting interpretation of Board refusing to revoke accessory building permit); Ivancovich v. City of Tucson Board of Adjustment, 22 Ariz.App. 530, 529 P.2d 242 (1974) (granting of height variance).

[5]Utah cases are not helpful. The only cases noted under 10-9-15 do not address the issue of what type of procedure is appropriate, for in both cases the protesting property owners failed to bring suit against the boards of adjustment . In Provo City v. Claudin, 91 U 60, 63 P.2d 570, failed to challenge an interpretation of "funeral home" to the Board as authorized, choosing rather to sue the City Commission ignoring an administrative appeal of the interpretation; and Crist v. Mapleton City, 28 U.2d 7, 497 P.2d 633 (1972) where the board (footnote continued)

However, even under such an interpretation it does not follow that its existence dictates changes of the substantive rights, scope of review or presumptions traditionally afforded under constitutional appellate review[6] of administrative zoning board decisions, whether the remedy be denoted "review", "certiorari", "appeal" or "action".

For example, it should be noted that Title 10 only applies to cities and to so hold grants an aggrieved party who owns land in unincorporated areas of the county (who is denied a variance by a county Board of Adjustment under Section 17-27-16)[7] a different substantive right for invoking the Court's limited appellate jurisdiction. This fact is true because judicial review of county Boards of Adjustment are by extraordinary writ of certiorari. Appellant submits such result would make reason stare.

It is respectfully submitted that Section 10-9-15 U.C.A. should be read in conjunction with Rules 81(d) and 65(b)(2) of

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[5]ruled on a contested interpretation over whether plaintiff's operation was a "school" authorized in residential districts. However, plaintiff did not sue the board but ignoring Section 10-9-15 to sue the building official via a writ of mandamus. The court ruled suit against the building official was improper when they should have sued the Board under Section 10-9-15.

[6]Section 7, Article VIII, Utah State Constitution.

[7]Section 17-27-16, Utah Code Ann. authorized counties to create boards of adjustment to perform basically the same functions as under the parallel for cities Section 10-9-12, Utah Code Ann. However, the statute is silent as to limitations or procedures for judicial review, which apparently will dictate proceeding by Rule 65(b)(2) under Rule 81(d), U.R.C.P.

the U.R.C.P. Utah should continue to follow the other well reasoned decisions of this and other states that limit appellate review of zoning board decisions to a review of the evidence before the administrative board and whether they acted arbitrarily, capriciously or illegally.

B. SECTION 10-9-15 DOES NOT DICTATE A TRIAL DE NOVO ON ISSUES OR EVIDENCE, BUT MERELY CLARIFIES THE COURT IS NOT CONFINED TO THE FORMAL WRITTEN RECORD OF THE ORIGINAL PROCEEDING.

Section 10-9-15 is silent as to the type of hearing and scope of evidence that is appropriate upon the judicial review of the administrative action. However Utah administrative review case law provides the answer.

The 1976 Utah case of Peatross v. Board of Commissioners of Salt Lake County, 555 P.2d 281 (Utah 1976) arose out of the County Commission's revocation of plaintiff's massage/health studio license. Plaintiff appealed to district court which held her petition for review should be via extraordinary writ; plaintiff filed an interlocutory appeal to claim a trial de novo.

This Court affirmed, acknowledging the responsibility of the district court to exercise its appellate review to conduct its constitutional supervisory control over inferior courts and tribunals under Section 7, Article VIII of the Utah State Constitution. Further, it held with the trial court that the Peatross facts fell under Rule 65(b) and that there was only limited appellant review. It states:

> "The standard rule is that appellate jurisdiction is the authority to review the actions or judgments of an inferior tribunal upon the record made in that tribunal, and to affirm, modify or reverse such action or judgment." Id. at p. 284 (Emphasis added).

The court goes on to state that:

> ". . . where the defendant Board has conducted a hearing that comported wth due process requirements, and where there is no express statutory grant of a trial de novo, the plaintiff was mistaken in her insistence that she is entitled to one as a matter of right. However we deem it appropriate to observe that notwithstanding what we have said herein, the petition for and the issuance of an extraordinary writ under Rule 65B is in the nature of a proceeding in equity; and we do not desire to be understood as foreclosing the proposition that the district court in the exercise of its general powers as hereinabove pointed out, could take evidence if it thought that the interests of justice so required." Id. at p. 284 (Emphasis added).

The court in Peatross, (purely a Rule 65(B) action) relied upon the earlier 1955 case of Denver & Rio Grande Western Railroad Co. v. Central Weber Sewer Improvement District, 4 U.2d 105, 287 P.2d 884 (1955). This 1955 D&RGW case did not arise under Rule 65(B) but under a statute.[8]

Plaintiffs contested they were entitled to a trial de novo, while the sewer district urged that only the certified evidence and record were reviewable. The court disagreed with both. It held a review of the record must be made in light of due pro-

[8]Quoting footnote No. 1 at 287 P.2d 836 of the 1955 D&RGW case the relevant portion of Section 3, Chapter 32, Laws of Utah, 1951 provided a remedy for a protesting property owner to "apply for a writ of review of the actions of the board . . ." No grant of trial de novo is mentioned.

cess. If the record reveals the board complied with due process and those facts support or negate the decision, the court could examine only the record to determine if there has been an abuse of discretion. However, if the record is inadequate the court is entitled to determine what facts were before the administrative tribunal and determine the factual considerations of the board.

The only case of which the writers are aware, where a statute uses the word "plenary", arose in the earlier 1940 case of Denver & R.G.W.R.Co. v. Public Service Commission, 98 U. 431, 100 P.2d 552 (1940) where the statute authorized a "plenary review" which was to "proceed as a trial de novo". This old case describes "plenary review" as a "full review, a complete review". The court went on to describe, on page 554, that this statute's express grant of a trial de novo did not contemplate retrial upon new evidence because this is inconsistent with appellate review. Rather, it was to be a trial upon the record made before the administrative body.

Thus, in this case, where a trial de novo was expressly granted, as is not the case before the bar, it was viewed as merely enlarging the type of evidence to extend beyond the certified record. It did not enlarge the judicial review to become the administrative hearing officer or allow it to consider matters not before the original administrative body.

In summary, Appellant submits that in absence of an express statutory grant of a trial de novo the Lower Court erred in

establishing itself as the City's Board of Adjustment. Further, the "plenary action" language of the statute merely entitles the reviewing court to extend beyond the certified record[9] and to accept testimony or evidence to get a more complete record of the facts, arguments and considerations which were before the administrative body decision, as described in D&RGW Co. v. Central Weber Sewer Improvement District, supra. The evidence of factors not considered or presented to the Board should not have been received in evidence. The retrial of issues and facts, on their merits, by the Lower Court as occurred in this case, will result with the Court becoming a super board of adjustment. This result is wrong and should be rejected by this Court.

C. THE LOWER COURT ERRED IN FAILING TO GIVE THE BOARD DECISION A PRESUMPTION OF VALIDITY AND IN FAILING TO IMPOSE THE BURDEN OF PROOF TO ESTABLISH BOARD ERROR BY CLEAR AND CONVINCING EVIDENCE.

The Lower Court failed to apply the universally accepted principle for the judicial review of zoning board decisions; that is: they are presumptively valid and the challenger has the burden of proof to have them overturned. These rules were developed to preserve the constitutional system of checks and balances and separations of powers. This Court enunciated and adopted these principles in Cottonwood Heights, supra. Here this

[9]As the court would similarly have discretion to do under Peatross in a Rule 65(b) action.

court recognized that: (1) Where boards are dealing with matters charged to their responsibility, it is assumed those boards have specialized experience or expertise in the area, and they are to be afforded a wide latitude in exercising their discretionary judgments; (2) The Board's actions are endowed with a presumption of validity; and (3) The challenger must prove an abuse of discretion or illegal actions by the zoning board by clear and convincing evidence. See also, Peatross v. Board of Commissioners of Salt Lake County, supra and Naylor v. Salt Lake City, supra; Gayland v. Salt Lake City Corp., supra, for other zoning cases where the general principle is sustained.

These principles are necessary to allow boards to fulfill their statutory responsibilities and powers involving discretionary judgments; for example, here under Section 10-9-12 to determine spirit and intent of City zoning ordinances, impacts of variances, etc.). In the Williams case, supra, Judge McIntyre recognized that zoning variances involve such discretionary judgment and indicates:

> . . . "That however, is a matter of opinion which in this instance was addressed to the sound discretion of the adjustment board. As long as our state statute authorizes exceptions and variances to be made, we cannot if we would prevent them from being made, unless the board's discretion is abused." 383 P.2d at 733 (Emphasis added).

This rule supports its underlying purpose to preserve the separation of powers and permit bodies with special expertise to function, without undue judicial interference. In short, the burden

is on the challenger to prove Board abuse of discretion or illegality; he correctly summarizes:

> "In keeping with the general rule that, in the absence of evidence to the contrary, public officers will be presumed to have properly performed their duties and not to have acted illegally, decisions of zoning boards of adjustment as to exceptions and variations are regarded as presumptively fair, reasonable and correct; and the burden is upon those complaining thereof to show the board acted improperly." (citations omitted, Id. at 733, emphasis added).[10]

The standard of judicial restraint to prevent inappropriate judicial interference with the administration of local zoning, has also been clearly stated by this Court; in Cottonwood Heights, this Court observed:

> "* * * and their action [administrative special use permit] endowed with a presumption of validity which the court should not interfere with unless it is shown that there is no reasonable basis to justify the action taken." 593 P.2d at p. 140 (Emphasis added).

It is for the challenger of a Board of Adjustment's action to bear the burden to show the decision is arbitrary and capricious.[11] The Court must not invade and substitute its judgment unless it is shown by clear (and convincing) error or showing "that there is no reasonable basis whatsoever to justify it and its actions must therefore be regarded as capricious and arbi-

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[10] See also Ivancovich v. City of Tucson, supra; Whitcomb v. City of Woodward, supra, Eason Oil Co. v. Uhls, supra, Siller v. Board of Supervisors of the City & County of San Francisco, supra.

[11] Gayland v. Salt Lake County, supra; 4 R. Anderson, American Law of Zoning, §25.26, p. 263 (2nd Ed, 1977).

trary."[12]

Since the law requires "no reasonable basis to justify the action," before a judicial reversal may be made, a situation where reasonable parties might differ obviously does not present facts sufficient to justify the Court substituting its judgment for that of the Board of Adjustment. The self-restraint required of the reviewing court has been explained in Yockley, Zoning Law and Practice, Second Edition, Vol. 1 at p. 479, quoted in the Colorado Levy case, supra. It noted:

> "It is a well settled proposition of zoning law that a court will not substitute its judgment for the judgment of the board. The court may not feel that the decision of the board was the best that could have been rendered under the circumstances. It may thoroughly disagree with the reasoning by which the board reached its decision. It may feel that the decision of the board was a substandard piece of logic and thinking. Nonetheless, the court will not set aside the board's view of the matter just to inject its own ideas into the picture of things." 369 P.2d 994 (Emphasis added).

To the same effect is the Kansas case of Rickard v. Fundenberger, supra. Here, the court held the trial court exceeded permissible review when it substituted its judgment for a Board who refused to cancel a building permit for an accessory building and proceeded to reduce its size. Similar to the case before the bar, that Kansas Lower Court judge stated he believed

[12] Naylor v. Salt Lake City Corp., supra at p. 766. See also Siller v. Board of Supervisors of City & County of San Francisco, supra, at p. 44; Monte Vista Professional Bldg., Inc. v. City of Monte Vista, supra at p. 402-3; Whitcomb v. City of Woodward, supra, at p. 456; Rickard v. Fundenberger, supra at p. 1072.

he had a large measure of discretion in such cases.[13] Correctly, he was reversed by the Kansas Supreme Court.

In the case now before this Court. the district court's finding and statements on the record clearly reflect (because of construing the hearing as a "de novo" trial) that it felt no obligation of judicial restraint. It felt free to and did substitute its judgment for the Board's. In doing so, the Lower Court ignored the facts before the Board demonstrating the reasonable basis for the Board's decision, improperly shifted the burden of proof and exceeded its authority. Thus, the Lower Court should be reversed.

The facts of the condition of the site, as they were presented to the Board, were not in substantial disagreement, although there was some confusion about the past history.[14] They demonstrated that Xanthos was seeking to legalize the existence of a dwelling unit which basically was an illegally-converted garage behind a duplex. To comply with ordinances, it would require that the structure not be used as a dwelling; thus it either must be removed or used as a shed or some accessory use.

Its negative impact on Xanthos was the loss of a rental unit and the income it produced. The benefits to the City of the

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[13] Rickard v. Fundenberger, supra at p. 1072. Compare with Judge Rigtrup statements and findings. (R-113, 137-40, and 346)

[14] See Statements of Facts, part C.

variance denial were that it would bring the site into zoning compliance. It would not legalize or encourage the continued use of a dwelling considered substandard in material ways including: the lack of frontage on a dedicated street; inadequate front, rear and side yards; the absence of necessary square footage for a place of human habitation; and other related impacts.[15] In short, a variance would materially have interferred with the goal of bringing the site into zoning compliance and enhancing the secondary area and neighborhood.

D. THE EVIDENCE BEFORE THE BOARD OF ADJUSTMENT ADEQUATELY SUPPORTS ITS DECISION

It appears from the record, already cited in the Statement of Facts, that the court disagreed with the Board, basically, because of the economic impact on Respondent and because of the loss of one dwelling unit in the City. The Lower Court viewed the impact of its continued use as a dwelling only from tangible results of its removal; it gave less weight than the Board did to the goals and purposes that zoning ordinances are attempting to achieve.[16]

Appellant submits there is more than reasonable support for the Board's decision. The Lower Court, based on its prejudices and judgment, simply disagreed with the priorities of the

[15]Statement of Facts, paragraphs 2, 3, 4, 6, 8, 14 and 15.

[16]Statement of Facts, pages 2-4, 6, 8, 11-12, 14-15 and 17.

Board. Thus, in error it felt free to substitute its judgment. Consequently, as a matter of law, the trial court' decision should be reversed and the board's decision affirmed.

POINT II

THE COURT ERRED IN MAKING ITS INDEPENDENT FINDING THAT RESPONDENT WAS ENTITLED TO A VARIANCE UNDER SECTION 10-9-12(3) BY MISCONSTRUING THE REQUISITE CRITERIA.

The Lower Court seriously misconstrued Section 10-9-12(3), Utah Code Ann., 1953. A proper reading of that section would have resulted in the court's denial of the requested variance, regardless of the scope of review. Section 10-9-12(3) states:

> "The board of adjustment shall have the following powers:
> . . .
> "(3) To authorize upon appeal such variance from the terms of the ordinance as will not be contrary to the public interest, where owing to special conditions a literal enforcement of the provisions of the ordinance will result in unnecessary hardship; provided, that the spirit of the ordinance shall be observed and substantial justice done. Before any variance may be authorized, however, it shall be shown that:
>
> > "(a) The variance will not substantially affect the comprehensive plan of zoning in the city and that adherence to the strict letter of the ordinance will cause difficulties and hardships, the imposition of which upon the petitioner is unnecessary in order to carry out the general purpose of the plan.
> >
> > "(b) Special circumstances attached to the property covered by the application which do not generally apply to the other property in the same district.
> >
> > "(c) That because of said special circumstances, property covered by application is deprived of privileges possessed by other properties in the same district; and that the granting of the variance is essential to the enjoyment of a substantial property right possessed by other property in the same district. (Emphasis added)

At a minimum, the statute requires that the applicant show: (1) special conditions attached to the property; (2) unnecessary hardship; and (3) the deprivation of substantial property rights. Then the Board must use its discretion to weigh such factors against the spirit of the ordinance. The Respondent has failed on every count to satisfy the required showings.

1. Special Conditions.

The reviewing court found that the following special circumstances existed:

> "There are special circumstances attached to the property covered by the application which do not generally apply to other properties in the same district including, but not limited to: (a) the age and occupancy of the dwelling; (b) the approval by the City of the development of the duplexes the issuance of certificates of occupancy for the duplexes (sic); and (c) the failure of the City to inform James Xanthos that the dwelling would not comply with zoning ordinances thereby failing to give him the opportunity to redesign the layout for the duplexes in such a way as not to require the demolition of the dwelling." Amended Finding of Fact #21, App.Ex.5.

Assuming that the facts cited in (a)-(c) are supported by the evidence, the enumerated special circumstances are not the type contemplated by the statute.

First, the language of subsection 3(b) states the "special circumstances" to be considered by the board are those that are "attached to the property covered by the application". A comparison of the parallel code section governing county boards of adjustment makes it more explicit. It states:

". . . Upon appeals the Board of Adjustment shall have the following powers: . . . (3) Where by reason of exceptional narrowness, shallowness or shape of a specific piece of property at the time of the enactment of the regulation, or by reason of exceptional topographic conditions or other extraordinary and exceptional situation or condition of such piece of property, the strict application of any regulation enacted under this act would result in peculiar and exceptional practical difficulties to, or exceptional and undue hardships upon, the owner of such property, to authorize, upon an appeal relating to said property, a variance from such strict application so as to relieve such difficulties or hardship, provided such relief may be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of the zone plan and zoning resolutions." §17-27-16, U.C.A., 1953, as amended (Emphasis added).

The specificity of this statute drives home the point that the "special circumstances" to be considered in the variance process are those that are basically topographic in nature. Furthermore, these topographical conditions must be unique to the subject property; those conditions that affect an entire district are not sufficient to grant a variance:

"The requirement of unique circumstances is not met simply by pointing out differences between the applicant's land and the land of other owners. It is not enough that, in fact and in law, each parcel of land is unique. The unique circumstances which must be established are those related to the hardship complained of. If singular and related topographical features are lacking, the court may not find that the circumstances which plague the applicant are different from those which affect the land of his neighbors." Anderson, American Law of Zoning 2d Ed. §18.34 and cases cited therein. (Emphasis added).

Thus, the type of special condition contemplated by §10-9-12(3) is that which applies directly to the land in question. The most diligent search of the record will not reveal one shred

of evidence concerning this type of special circumstance. Indeed, the court's Finding No. 21 evidences little regard for circumstances that attach to the land, but instead places great emphasis on the failure of the City to detect and resolve violations during construction. Cursory examination of the enumerated "special circumstances" will show that they do not qualify as special conditions.

As to the Lower Court's finding about "the age and occupancy of the dwelling", a building may be old and have a history of illegal occupancy. That fact may or may not make it unique in the zoning district; but, it tells us nothing about specific topographical features relating to the property which distinguish it from other properties in the same district. If a variance can be sustained simply because of the existence of an old building on a lot, the goal of bringing non-conforming buildings into compliance would be thwarted; zoning would soon be by variance, rather than ordinance. Pointing out that an old building is on the lot merely recognizes that no two parcels are exactly alike. In this broad sense, every parcel has unique characteristics and could qualify for special treatment; and this absurd result demands a stricter interpretation of the requirement.

The court's other special circumstances "(b)" and "(c)" are, likewise, manifestly unrelated to the property in question. They obviously relate only to the relationship between the Respondent and the City zoning officials.

The court's findings imply that differences between individual owners of parcels can be considered as a "special circumstance." This ruling invites the type of arbitrary and capricious action that should be guarded against, because the variance runs with the land. The holding of the court below, if allowed to stand, would result in the anomolous position that the Board of Adjustment could grant variances to individuals it felt demonstrated sympathetic personal circumstances.

Of course, just the converse is the rule. If the property is susceptible of productive use, the desires of the particular owner cannot be considered. The rule is that "[A] variance pertains to the property, not to the owner." Stice v. Gribben Allen Motors, Inc., 216 Kan. 744, 534 P.2d 1267, 1272 (1975).[17]

The Board, therefore, submits that the court below improperly found "unusual circumstances", based on facts which, under a proper reading of the statute, must not be considered at all. Furthermore, there is no evidence in the record that the topography of this parcel is unique in any way. In fact, what evidence there is supports the view that this parcel is completely ordinary. Therefore, it was error for the court to compel the granting of the variance.

2. Unnecessary Hardship.

[17]See also: Anderson, supra, §18.30; City and Borough of Juneau, 595 P.2d 626, (Alaska, 1979); Lovell v. Planning Com'n, 37 Or.App. 3, 586 P.2d 99 (1978).

The "unnecessary hardship" requirement of the law has evolved into a principle limiting the power of boards of adjustment to grant variances. Similar language appears in the statutes of nearly all of the states.[18] Even though this is a nebulous term, the courts have, historically, been quick to vest the term with content so as to protect comprehensive zoning plans.

The most widely-accepted definition of unnecessary hardship is found in the landmark case of Otto v. Steinhilber, a New York court of appeals case dating to 1939. The court said:

> "Before the board may exercise its discretion and grant a variance upon the ground of unnecessary hardship, the record must show that (1) the land in question cannot yield a reasonable return if used only for a purpose allowed in that zone; (2) that the plight of the owner is due to unique circumstances and not to the general conditions in the neighborhood which may reflect the unreasonableness of the zoning ordinance itself; and (3) that the use to be authorized by the variance will not alter the essential character of the locality." 282 N.Y. 71, 24 N.E.2d 851 (1959), reh. den. 282 N.Y. 681, 26 N.E.2d 811 (Emphasis added).

Although other courts have slightly altered this standard, it remains the classic definition of unnecessary hardship.[19]

The question, then, is whether or not the court's findings regarding unnecessary hardship are in harmony with the great weight of authority on this point. The findings of the court indicate that the hardships it considered were:

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[18] Anderson, American Law Zoning 2d Ed. §18.09.

[19] Anderson, Id. §18.16.

"10. There is in Salt Lake City a shortage of low income housing and the elimination of this dwelling which provides low cost housing is inconsistent with the public need and interest.

"11. Elimination of this unit would cause a hardship to a tenant who would be deprived of a habitable dwelling at a relatively low cost of $150.00 per month.

"12. Elimination of the unit also creates an economic hardship for the plaintiff in this action by imposing an unnecessary loss of $150.00 per month." (App.Ex.5)

These hardships fall into two categories: (1) an economic hardship upon the owner due to the loss of rental income (finding no. 12); (2) hardship upon the community generally and a tenant specifically in the loss of housing (findings nos. 10 and 11). In addition, Finding of Fact No. 21(c) implies that a hardship upon the Respondent existed because he was not informed of the nonconforming nature of his plans soon enough to change them.

(a) Economic Hardship Upon the Owner. This Court in 1939, ruling on the predecessor statute to Section 10-9-12(3), indicated that an economic benefit to the owner is not a sufficient reason to compel the granting of a variance. It noted that any person could argue that if he were granted a variance he could make a more profitable use of his land. Walton v. Tracy Loan & Trust Co., 97 U. 249, 92 P.2d 724, 728 (1939). Case law across the country uniformly upholds this view.

As Anderson points out, since a variance runs with the land, and not the owner, "[i]t follows that . . . hardship which is merely personal to the current owner of real property will not

justify the granting of a variance." American Law of Zoning, 2d.Ed. §18.30. As the Arizona court has correctly noted, neither the board, nor the court upon review, can be governed by financial considerations alone; rather: "'They are bound to take a broader view than the apparent monetary distress of the owner.' (citation omitted)" Ivancovich v. City of Tuscon Board of Adjustment, supra, 529 P.2d at 249. "The universal rule is that 'the financial loss or the potential of financial advantage to the applicant is not the proper basis for a variance'." Stice v. Gribben Allen Motors, Inc., Parsons, supra, 534 P.2d 1272 and numerous cases cited therein.

The position taken by the Lower Court would soon riddle the uniform zoning plan with personal economic variances. As Justice Tobriner in writing for the California Supreme Court, has recognized:

> "In a word, 'profit motive is not and (sic) adequate ground for a variance.' (citations omitted) . . . If conditions which merely reduce profit margin were deemed sufficiently 'exceptional' to warrant relief from the zoning laws, then all but the least imaginative developers could obtain a variety of variances, and the 'public interest in the enforcement of a comprehensive zoning plan' (citation omitted) would inevitably yield to the private interest in the maximization of profits." Broadway, Laguna, Vallejo Ass'n. v. Board of Permit Appeals of City and County of San Francisco, 59 Cal.Rptr 146, 427 P.2d 810, 815 (1967) (Emphasis added).

Of course, as the court went on to note, any hardship can ultimately be put into economic terms. But the point is that the "unnecessary hardship" requirement is not met by a showing of a

loss of rental income.

The facts clearly indicate there is no sufficient hardship in this case to justify the variance requested. There are eight rental units now on the property that are producing income. Just because their income is less than the Respondent wishes and the extra rental unit's income cushions his margin is insufficient basis for a finding of unnecessary hardship to sustain a variance.

(b) Hardship Upon the Community in General. The conclusion of the court below was that a shortage of low income housing exists in Salt Lake City. There was no evidence presented by Respondent and only generalized statements of City zoning officials, on questioning by the court, that no city has enough low income housing. Based on those statements, the court held that to deny the variance would create a hardship upon the community and tenant, since a dwelling would be lost. This assumption by the court falls far short of the hardship contemplated by Section 10-9-12(3).

The statute, itself, compels consideration of only those hardships which are upon the applicant. Subsection 3(a) reads: ". . . the imposition of which [hardship] upon the petitioner is unnecessary. . . ." There is no indication that the board or the reviewing court should consider other generalized or perceived interests.

Zoning administrative authorities are properly concerned

with advancing the intent and purpose of legislation, not in substituting their own personal policy for the legislation. The variance power must, therefore, be strictly construed; otherwise, the Board and the reviewing court will be making forays into public policy areas set-aside for elected legislative bodies. If zoning ordinances are felt by the board or the court to conflict with community welfare, then the proper remedy lies in amending the ordinance, not in the granting variances.[20]

Furthermore, testimony in the record indicates that the well considered policy of the City is contrary to the finding of the court. Mr. Allen Johnson, Deputy Director of Advanced Planning for Salt Lake City testified:

> "The witness: . . . We are committed, I think, as a moral obligation in the planning department in this city to not only increase the numbers of low income housing, but the quality of the life style that is afforded or that is available to that low income tenant or individual. So it's a two pronged attack, one of quantity and one of quality. We are spending our limited resources as a city to do both of these things as best we can while at the same time doing other things. . . .
>
> "The court: Do you recognize that there is a shortage of housing in Salt Lake?
>
> "The witness: There is a shortage in every city of quality low income housing.

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[20] Walton v. Tracy Loan and Trust Co., 97 U.249, 92 P.2d 724 (1939); Lovell v. Planning Com'n, 37 Or.App. 3, 586 P.2d 99 (1978); Banks v. City of Bethany, 541 P.2d 178 (Okla., 1975); Topanga Ass'n, Scenic Com. v. County of Los Angeles, 113 Cal.Rptr. 836, 522 P.2d 12 (1974).

"Q. (By Ms. Lever) Have you ever received a directive, though, that even though there is a need for housing, that that has priority to allow or to encourage the existence of or the construction of buildings that are substandard as applied to the zoning standards?

. . .

"A. No. We have not received a direct order or the City does not have a policy that allows for the construction of substandard buildings at the expense of the zoning ordinance that guarantees those amenities." (R-404-05) (Emphasis added).

All indications are that the court below overstepped its bounds in considering community interests as a hardship under §10-9-12(3).[21]

The case law is in definite accord. A Massachusetts court faced the argument that denial of a variance for apartment buildings created a cognizable hardship. The court said:

"The most obvious deficiency in the board's decision is the lack of a finding of 'conditions especially affecting such parcel . . . but not affecting generally the zoning district in which it is located,' such that 'substantial hardship, financial or otherwise to the appellant' is involved. Indeed, the board's only finding of a hardship is 'that hardship exists in that there is a shortage of housing units for large families.' This is obviously not a 'hardship, financial or otherwise to the appellant' seeking a variance before the board, in this case the developer of the parcel." Cass v. Board of Appeal of Fall River, 317 N.E.2d 77, 79 (Mass.App. 1974). (Emphasis added).

The California courts agree, stating:

"The claim that the development would probably serve

[21]The result in this case demonstrates the problems with a de novo type review as contemplated by the court below, i.e., courts must become enmeshed in public policy questions more properly left to the legislative body. This court warned of such a result in the Walton case, supra, 92 P.2d at 727.

various community needs may be highly desirable, but it too does not bear on the issue at hand [that of hardship]." Topanga Ass'n v. County of Los Angeles, 113 Cal.Rptr. 836, 522 P.2d 12, 21 (Cal. 1974); accord, Broadway, supra, 427 P.2d at 817.

In sum, the court erred by: (1) weighing the enforcement of the zoning ordinances against the need for low income housing which is a function more properly reserved to the legislative body; and (2) by considering a hardship upon the community as a hardship under Section 10-9-12(3), which instead should be focused on the hardships of the variance applicant.

(c) Hardship Due to City's Failure to Warn. As evidenced by Finding of Fact Nos. 21(c), and 15-19 the court held that the City had a duty to inform Mr. Xanthos of errors in his plans. The failure of the City to warn him early enough to allow him to change his plans resulted in a hardship which should now, according to the Court, justify a variance. In essence, the court held that the City should be estopped to enforce the zoning ordinances because of their supposed failure to "catch" the non-complying building during plan review or construction.

This holding is in error for at least two reasons: (1) The law in this state is that a municipality cannot be estopped from enforcing its zoning ordinances, even though its officials may have mislead a citizen into believing that he could erect a non-complying structure; and (2) the particular facts of this case are not sufficiently compelling to warrant the granting of an estoppel.

This case should be governed by Dansie v. Murray City, 560 P.2d 1123 (Ut., 1977). The operative facts are similar and, even though in that case substantial good faith cash investments would be wasted if the ordinance was enforced, this Court held the city was not estopped. Since in this case the building in question can still be put to beneficial use, even if the ordinance is enforced; a similar holding is required here.

Second, even assuming that an estoppel might be imposed against a city, when acting in a governmental capacity because of the unauthorized acts of its officials; the facts of this case would not compel such a result. Even when all the underlying facts are viewed in a light most favorable to the him, the Respondent does not qualify to benefit by estoppel. Basic rules concerning the granting of an estoppel state:

> ". . . [A] party may not properly base a claim of estoppel in his favor on his own wrongful act or derelection of duty, or fraud committed or participated in by him, or on acts or omissions induced by his own conduct, concealment, or representations. . . . One who claims a benefit of an estoppel on the ground that he has been mislead by the representations of another must not have been mislead through his own want of reasonable care and circumspection. A lack of diligence by a party claiming an estoppel is generally fatal." 28 Am.Jur.2d 719-722, Estoppel and Waiver, §79-80 (Emphasis added).

The undisputed facts of the case indicate that the failure of the City to warn Mr. James Xanthos of the non-complying nature of his plan was based, at least, in part on the inaction of Mr. Xanthos or his agents and the deceptiveness or incompleteness of the

plans that were submitted.

First of all, it is undisputed that the plans and applications that were submitted to the City for review were at least, inconsistent and inaccurate.[22] The plot plan, instead of showing a dwelling, showed only an "existing building." The application for a building permit was improperly filled out; where it asked for "previously used land or structure", Mr. Xanthos or his agent put "vacant". Also, on the line which read "Dwelling units now on lot:", "0" appears. Additionally, the blank under "accessory bldgs. now on lot" was left blank.

On examination, both Mr. Blair and Mr. Hafey testified that if the application had indicated a dwelling on the premises, permits for the duplexes would not have been issued (R-225-26, 255-56). However, opposing counsel argued and the court held that these ambiguities made it incumbent upon the City to either investigate further or be estopped to deny a variance.

Indeed, this is the penultimate decision: who should bear the burden of an incomplete and/or deceptive application for a building permit? Should it be on the applicant and representor or upon the City? If the law required the City to "investigate or be estopped" upon the discovery of some ambiguity, Utah cities would be required to play cat and mouse with every person that

[22]Findings of Fact Nos. 15, 19; see App.Ex. 1 and 2 for the plan and application.

applied for a building permit. Such a rule would encourage or reward deception, inaccuracy, incompleteness and elusiveness upon the part of all applicants for permits.

In other words, such a rule encourages one to submit ambiguous plans that appear to comply, but build as you want. It would create enormous incentive to corrupt inspectors and more tax dollars would go to hypercritical inspection. People would be encouraged to hide facts from the City officials in hopes that they might be able to proceed undetected to a point that their change in position would operate to estop the City from enforcing the ordinance. The comprehensive zoning plan would soon be lost. This result is clearly inimical to public policy.

Rather, the law is and must be that the applicant for a building permit who fails to completely divulge his circumstances must bear the risk the City may later find violations that would warrant the stoppage of construction. Case law from other jurisdictions considering this issue so hold. In City of Chicago v. Zellers a building permit had wrongfully been issued and, thereafter, revoked by the city. The plaintiff argued that the city should be estopped from enforcing the ordinance and stopping the construction, since the permit had been issued. However, the court found that the permit had been issued partly as a result of ambiguous plans and, therefore, found that even though those plans had been submitted, checked and approved by various divisions of the building department, that they were deceptive on

their face. The court thus held that estoppel would be improper against the city. 64 Ill.App.2d 24, 212 N.E.2d 737, 739-40 (Ill.App. 1965). An Oklahoma case dealt with a similar subject, and that court said:

> "To allow a property owner to circumvent, or obtain an exception to, zoning ordinances by putting himself in a position (through his own acts and those of his agent or servant) wherein that enforcement would have a harsh, or detrimental, affect on him would practically emasculate such ordinances and make of their attempted enforcement a mere mockery." In re Pierce's Appeal, 347 P.2d 790, 793, (Okla. 1959).

The facts of this case indicate that this would be an improper case to apply estoppel. The Lower Court's finding that implicitly imposes such an estoppel was grievous error. Rather, the law must remain that the applying property owner must bear the risk of his own agent's carelessness or intentionally misleading representations.

3. Deprivation of Substantial Property Rights

The statutory language in Subsection 3(c) provides that the property covered by the application must be deprived of privileges possessed by other properties in the same district because of special circumstances, before a variance can be awarded. It has been shown above that there are no special circumstances that affect this property; thus, there can be no cognizable deprivation of substantial property rights.

Furthermore, it is Appellant-Board's contention that the granting of this variance in essence confers a special privilege

upon the Respondent. Rather than insuring that this property shall enjoy the same rights enjoyed by other parcels of property in the district, the variance instead grants it and its owner a special privilege, not available to and in derogation of the rights of others. The case law has recognized that this undesirable result is possible and should be avoided by refusing to grant variances, except for those exceptional topographical circumstances which act in conjunction with zoning ordinances to deny the property owner any beneficial use of his property. For example, the Alaska Supreme Court has pointed out:

> "The assertion that the ordinance merely deprives the landowner of a more profitable operation where the premises have substantially the same value for permitted uses as other properly within the zoning classification argues, in effect, for the grant of a special privilege to the selected landowner." City and Borough of Juneau v. Thibodeau, 595 P.2d 626, 635 (Ala., 1979) accord, Topanga Assoc. v. County of Los Angeles, supra at 22; 2 C. Rathkopf, The Law of Zoning and Planning, §45.3 at 45-8 (3rd Ed. 1972).

The converse of this principle would result in invidious distinctions. Coronet Homes, Inc. v. McKenzie, 439 P.2d 219, 225 (Nev., 1968). Furthermore, to allow an applicant a variance on such a basis would result, in effect, to a spot zoning change; this act is, of course, proscribed. Thurman v. City of Mission, 520 P.2d 1277, 1278, (Kan 1974), Erickson v. City of Portland, 496 P.2d 726, 727 (Or. App. 1972).

The most rational reading, therefore, of the deprivation of substantial property rights language in the statute requires that

the applicant show that, under the zoning ordinances, his land cannot be put to any reasonable use. Here, the parcel is being put to valuable use. The building in question can be used, without even considering the land's use and value in relationship to the four duplexes as open space, playground areas or other uses, if removed, as an accessory building without violating the ordinances. Significantly, no property owner in the vicinity has any greater rights or similar privilege. Therefore, no claim has been made that satisfies the requirements of the statute; to grant the variance would result in the conferring of a special privilege, which is contrary to the spirit of the ordinance and the constitution as well.

POINT III

THE COURT ERRED IN ITS FINDING THAT GRANTING OF THE VARIANCE WOULD NOT BE CONTRARY TO THE SPIRIT OF THE ORDINANCE AND THE PUBLIC INTEREST; IT IGNORED THE RECORD'S SUPPORT FOR THE BOARD'S DECISION.

Even if Respondent had met all of his burden as described in Point II, this Court has ruled that: "the spirit of the ordinance must be observed, that is, no variance may be granted which is not in harmony with the purpose, object, policy, intent and plan of the City as manifested in the zoning and building ordinances." Walton v. Tracy Loan and Trust Co., supra at 727. The District Court, in its amended findings of fact, found that these requirements had been met:

"5. The continued existence of the dwelling, does not

violate any safety requirements, nor does it impair access, nor does it adversely affect the health, safety or morals of the citizens of Salt Lake City.

. . .

"20. (a) The variance in this case is not contrary to the public interest. . . .(c) In light of the fact that the spirit of the ordinance has been observed and there has been substantial justice done.

. . .

"22. The imposition of the strict enforcement of the zoning ordinances upon the petitioner is unnecessary in order to carry out the general purpose of the zoning plan and comprehensive plan in the city."

The Board contends that these findings are purely form, being unsupported by what evidence there is in the record; rather, the spirit and purpose of the plan have been ignored and not observed.

The result of the Lower Court's decision underscores the importance of what one court said, when faced with a similar problem:

> "The days are fast disappearing when the judiciary can look at a zoning ordinance and, with nearly as much confidence as a professional zoning expert, decide upon the merits of a zoning plan and its contribution to the health, safety, morals or general welfare of the community. Courts are becoming increasingly aware that they are neither super boards of adjustment nor planning commissions of the last resort." Coronet Homes, Inc. v. McKenzie, 439 P.2d 219 (Nev., 1968) (Emphasis added).

Undoubtedly, the Court below felt that granting this one isolated variance would be so harmless as to pass unnoticed. But this nearsighted attitude fails to visualize the larger issue. One authority notes:

> "Granting a variance for reasons other than extreme hardship may seem innocuous in its present impact on

> the immediate neighborhood. However, 'long range planning may show that this will result in a flood of such demands, or be inconsistent with the desirable allocation of land uses . . . or hinder the proposed future evolution of the area into a fine residential one.' Thus, improper variances not only threaten neighborhood integrity and undercut the protective purposes of zoning, but they also challenge the objectives of comprehensive urban planning." Shapiro, The Zoning Variance Power - Constructive in Theory, Destructive in Practice, 29 Md. L. Rev. 3, 10 (1969). (Emphasis added).

Indeed, unless the variance process is closely guarded, it can be destructive of the comprehensive zoning plan meant to benefit the public. The zoning authorities and the courts have a duty to be farsighted in protecting the general public's interests from selfish individual interests. As the Pennsylvania court has said:

> "While a change . . . seems both small and innocent, it might be neither when regarded as a trend: and it is with trends almost more than with individual monstrosities that the zoning authorities are concerned." Heller v. Zoning Board of Adjustment, 171 A.2d 44, 46 (Penn., 1961).

The tenor of Section 10-9-12(3) is not to the contrary. The court below erred in having little regard for the City's comprehensive zoning plan; its decision has adversely affected the zoning plan, in violation of the statute, in at least the following ways:

1. Parity. As discussed above, every landowner has an interest in the enforcement of a comprehensive zoning plan. Each time a variance is granted, without a showing of extremely unusual conditions, the law abiding landowners in the vicinity

suffer.

Ideally, each landowner gives up a part of his freedom to use his land in order to comply with zoning laws which are legislated to deliver the greatest good to the greatest number in the community. That law-abiding citizen is all too often cheated by a liberal variance policy that allows his neighbors to evade the ordinances. Coronet Homes, Inc., supra, at 224. The plan thus falls into disrepute. Topanga Ass'n., supra, at 19. Thus, the idea that an isolated variance grant won't really harm the plan "significantly" is erroneous.

A liberal variance policy would lead to: (1) a flood of applications for variances; and (2) disrespect for and an eventual disintegration of the comprehensive zoning plan. Therefore, it is not in the public interest to allow such variances indiscriminatly.

On the other hand, if a landowner can make a sufficient showing of "unique" and "special conditions" that attach to his property, then parity could be maintained, even though a variance is granted. The uniqueness of the property warrants unique treatment. It is this high standard and overall perspective that the Board uniquely must administer in implementing the spirit of the ordinance.

2. Protection. Mr. Allen Johnson testified that yard size ordinances are designed to protect renters and owners from invasions of privacy, as well as from other dangers. Also, the ordi-

nances guarantee that renters will have an acceptable yard area, something that is lacking here. He states:

> ". . . specifically with respect to the yard area the building, the zoning ordinance provides open space around a structure which affords the occupant the privilege of enjoying the outdoors, of doing those things around your house that you would normally do around the house, like hanging your wash out, letting your kids play outside, having an area guaranteed for that purpose so that it isn't obstructed or interferred with with somebody else. They are not going to have a carport or a wading pool for instance. The availability of some assurance that someone walking down the alley isn't going to look right into your bedroom or bathroom window, as just a common occurrence walking down the alley, and the separation from the house to the side-yard property, or the front property line to the street or the house excuse me. The yard area also, and especially the rear yard, afford the occupant the space to do those things that might be necessary to support the use of his home, where he can store materials that you wouldn't want to have in the front yard, including your garbage. Or you can maybe put a workshop or a garage or a carport or a patio and be assured of some privacy from the neighbors." (R-394A-395)

Consequently, the court's finding that the continued use of the building as a dwelling did not impair access by fire or police agents, etc. does not fully address the objective and goals of yard area requirements. Furthermore, the importance of adequate side and rear yards has been recognized by this Court in Hargreaves v. Young, 3 U.2d 175, 280 P.2d 974 (Utah, 1955).

3. Accessibility. The small building in question lacks the required frontage on a dedicated street. This was not addressed by the court's findings, although Mr. Johnson did testify that this zoning requirement is extremely important to the comprehensive zoning plan:

"Q. [By Ms. Lever] The requirement of frontage on dedicated streets, does that have impact or any direct relationship in terms of the planning purposes and objectives related to providing services for that building? Public services?

"A. [By Mr. Johnson] . . . So frontage provides a person with, first, a direct accessibility to public utilities underground, or in this case maybe some power poles and things like this. It also is very keyed toward dispatch of emergency services. . . . So that if an emergency vehicle was dispatched to that address, we would have a difficult time finding the building, which is central to a key concern of ours. One of the major objectives in the fire department is a reduction in response time necessary, and the City is judged by our ability to respond quickly to fires. The insurance rates that applies on all the residences of Salt Lake City is based upon that very factor, along with the type of equipment we have and how fast we can get that equipment in the field and respond to emergency situations. The frontage also provides the property owner with a place where he can take his trash out, his garbage out and set it up there. He doesn't have to worry about carrying it out and putting it up in front of somebody else's house and walking down somewhere else on the sidewalk to deposit his trash on the street." (R-396-97)

The only evidence in the record supports the view that frontage upon a dedicated street is, indeed, an important aspect of the zoning ordinance which underpins the Board's decision. To allow a variance which encourages the use of a nonconforming structure, without the required frontage would be contrary to the spirit and a major objective of the ordinance.

4. Stabilization of Neighborhoods. Mr. Johnson testified as to the importance of comprehensive zoning, as it impacts upon developing neighborhoods:

"Q. [By Ms. Lever] Now, are there objectives that are contained within the master plan that deal with

attempting to stabilize existing developed neighborhoods?

"A. Yes. That's one of our mandates at the moment, is the preservation of a residential area and the enhancement of those residential areas. The programs and policies that we are using right now, and of course the zoning ordinance through its nonconforming provisions, assist the City in removing buildings, or encouraging the removal of buildings that do not conform to today's standards." (R-402)

This is another area that the court failed to address in its finding that the variance requested would not affect the public health, safety or welfare. The testimony of the zoning officials charged with planning for that very welfare indicates that the opposite is true.

Other negative impacts of the variance, which were discussed by Mr. Johnson but seem to have been ignored by the court, are: (1) garbage collection (R-394, 398, 401); (2) density requirements (R-395 also 311-312); and (3) parking (R-408-409). The listing could continue, but the point is that the court, in its zeal to focus on one citizen, refused to recognize the public interest as required by statute. As Mr. Johnson testified:

"Q. In your opinion, is there any harm done to the master plan if this building is allowed and authorized and legalized for dwelling purposes?

"A. Well, it runs contrary to the whole goal of the City's planning effort. One, the stabilization enhancement of the residential areas. Carries with it all those negative characterizations that we are trying to eliminate. The zoning ordinances of course are to be equally administered, and I think that in this case if the position was that this building would remain (sic) (as) a City decision, then we should rethink that overall goal for Salt Lake City and think in terms of

not so much enhancement, but just strictly numbers of rental dwelling units.

"Q. Is that contrary to the legislative mandate and policies -- . . . as you understand them to be implemented?

. . .

"A. Yes, it is." (R-408-409)

It is respectfully submitted that the record abundantly supports the Board's denial of the variance. This is true whether viewed from the facts before the Board or those presented de novo to the Court. The Lower Court erred in not affirming the denial. It was a request unsupported by facts to demonstrate an extremely unique special circumstance, or where strict zoning enforcement would work an unreasonable hardship when balanced against the public interest.

CONCLUSION

Appellant seeks a reversal from this Court of the error of the Lower Court in conducting a trial de novo when reviewing a decision of the Board of Adjustment. As a matter of law such litigation must be reviewed by the courts in their limited appellate jurisdiction merely to determine if the administrative body did not abuse its discretion which is presumed valid. Courts are not free to substitute their judgment unless the evidence is devoid of reasonable support.

In so doing, the District Court also erred by failing to afford the administrative decision with a presumption of validity and by assuming the prerogative to substitute its judgment for

the Board's in reweighing and rebalancing the evidence before the Board.

Inasmuch as the record clearly shows such reasonable support for the Board's decision, Respondent failed to meet its burden to show clear and convincing error, and therefore the Board's decision should be affirmed.

DATED this _____ day of August, 1982.

JUDY F. LEVER
Assistant City Attorney
Attorney for Defendant-Appellant

cc61

Receipt No. | Date Issued 4-18-74 | Permit Number 17 322

4 —

Present Use of Structure: ES DWELLING

Address: 1560 W 900 So.

1602 - C9 WEST
1606 - 12 4th
1616 - 18 South

Certificate No. 35637

Assessors Parcel No.

*Block: 3

*Subd. Name & Number: 3RD BURLINGTON SUB

Location

*If metes and bounds see instructions

Property Area - In Acres or Sq. Ft.: 37,175 —

Total Bldg. Site Area Used: Terne

Phone

Owner of Property: MES XANTHES

Address: EG South Mckenzie

City

Owner's Name Address

Business Lic. No.

Architect or Engineer: SCSC Enclosed Iain

Phone

Owner: HARGREAVES

Phone: 393757

Contractor: ELAND CONST. Co 268-1047

Contractor's Address: 65E So 130 [illegible]

*State Lic. No.: B2-19492

*City/Co. Lic. No.

Electrical Contractor: CONKHD ELECTRIC 268-1097

Phone

Contractor's Address: SAME

*City/Co. Lic. No.: CC CC 1

Plumbing Contractor

Phone

Address

*City/Co. Lic. No.

Mechanical Contractor

Phone

Address

*City/Co. Lic. No.

Present Use of Land or Structure: VACANT.

Proposed Use of Land or Structure

Units Now on Lot: —0—

*Assessory Bldgs. Now on Lot

Improvement/Kind of Const.

Sign ☑ Build ☐ Remodel ☐ Addition

Repair ☐ Move ☐ Convert Use ☐ Demolish

Offstreet parking spaces: Covered Uncovered

SUB-CHECK | Zone | Zone Approved By

Date | Sub-Ck. By

Setbacks In Feet

Side	Side	Rear

Indicate Street Corner Lot

PLOT PLAN

Prop. Line | Prop. Line

House or House & Garage If Attached

STREET

Indicate North

BUILDING FEE SCHEDULE

4-Duplex. Square Ft. of Building 1536 Sq. Ft. Valuation Building $20,000 = Per

☐ Rough Basement	Building Fees	366.00
☐ Finish Basement	Plan Check Fees	
Carport sq. ft.	Electrical Fees	
Garage sq. ft.	Plumbing Fees	
Other Detached Parking	Mechanical Fees	
Type of Bldg.	Water	
*No. of Dwellings: 2 / No. of Bldgs. 1 / No. of Stories 1	Sewer	
Occ. Group	Storm Sewer	
Type of Construction: ☑ Frame ☐ Brick Ver. ☐ Brick ☐ Block ☐ Concrete ☐ Steel	Moving or Demo.	
Max. Occ. Load	Temporary Conn.	
Fire Zone	Reinspection	
Fire Sprinklers Req. ☐ Yes ☑ No	Other	
	Other	
	Total	366.00

Building Inspector Signature

Comments: Howard.

Plan Chk. OK by

Chemical toilets or other approved facilities are required at construction sites, to conform with Utah Plumbing Code.

Special Approvals	Required	Received	Not Req.
Board of Adjustment			
Health Dept.			
Fire Dept.			
Soil Report			
Water or Well Permit			
Traffic Engineer			
Flood Control			
Sewer or Septic Tank			
City Engineer (off site)			
Gas			

CERTIFICATE OF OCCUPANCY REQUIRED

Building permits issued must meet all requirements of city ordinances and the uniform building code and electric, plumbing and heating codes. All plan changes must be approved by building and housing services department.

Signature

Comments: Re Seal-k No. 2443 July 1973.

Land Use Cert.

Electrical Dept.

HiBack C.G. & S.

Other

Bond Required ☐ Yes ☐ No Amount

Signature of Approval

This permit becomes null and void if work or construction authorized is not commenced within 120 days, or if construction or work is suspended or abandoned for a period of 120 days at any time after work is commenced. I hereby certify that I have read and examined this application and know the same to be true and correct. All provisions of laws and ordinances governing this type of work will be complied with whether specified herein or not the granting of a permit does not presume to give authority to violate or cancel the provisions of any other state or local law regulating construction or the performance of construction and that I make this statement under penalty of perjury.

Signature of Contractor or Authorized Agent — Date: 4-15-74

Signature of Owner (If owner) — (Date)

PLANNING DEPT. USE

Census Tract	Traffic Zone	Coordinate Ident. No.

New S.L.U. Code No. | Old S.L.U. Code No.

APPENDIX 1

INSPECTION CARD

This card shall be posted on the [illegible] place on which will be made [illegible]

ADDRESS _____

_____

NOTICE

Approved Building plans are required on job site at time of each and every inspection.

ALSO NOTE

No work of any kind, on any part of any building or structure requiring inspection shall be covered or concealed in any manner whatsoever, without first obtaining the approval of the Building Official in writing.

	DATE	APPROVED	REMARKS
Setback			
Zoning			
Footings			
Foundation Reinforcing Steel			
Excavation and Forms			
Slab Grade			
Ground Plumbing			
Underslab Ducts			
Underslab Conduit			
Fireplace Foundation			
Joist and Girders			
Electrical Ground			
Temporary Power			
Mid-Height Bond Beam			
8 Foot Bond Beam			
Final Bond Beam			
Fireplace Bond Beam			
Roof Sheathing			
Framing and Ventilation			
Roof Covering			
Rough Heating			
Electrical Service and Ground			
Rough Electrical			
Rough Plumbing			
Shower Pan Test			
Stucco Mesh or Exterior Siding			
Sewer			
Interceptor			
Septic Tank			
Leach Line or Seep Pit			
Back Flow and Cross Connection			
Water Service			
Lath or Drywall Nailing			
Gas Line Air Test			
Final Electrical			
Final Plumbing			
Final Heating A.C.			
Final Construction	1-16-76	Mais. F.	

DO NOT CONCEAL UNTIL ABOVE ARE SIGNED AND DATED

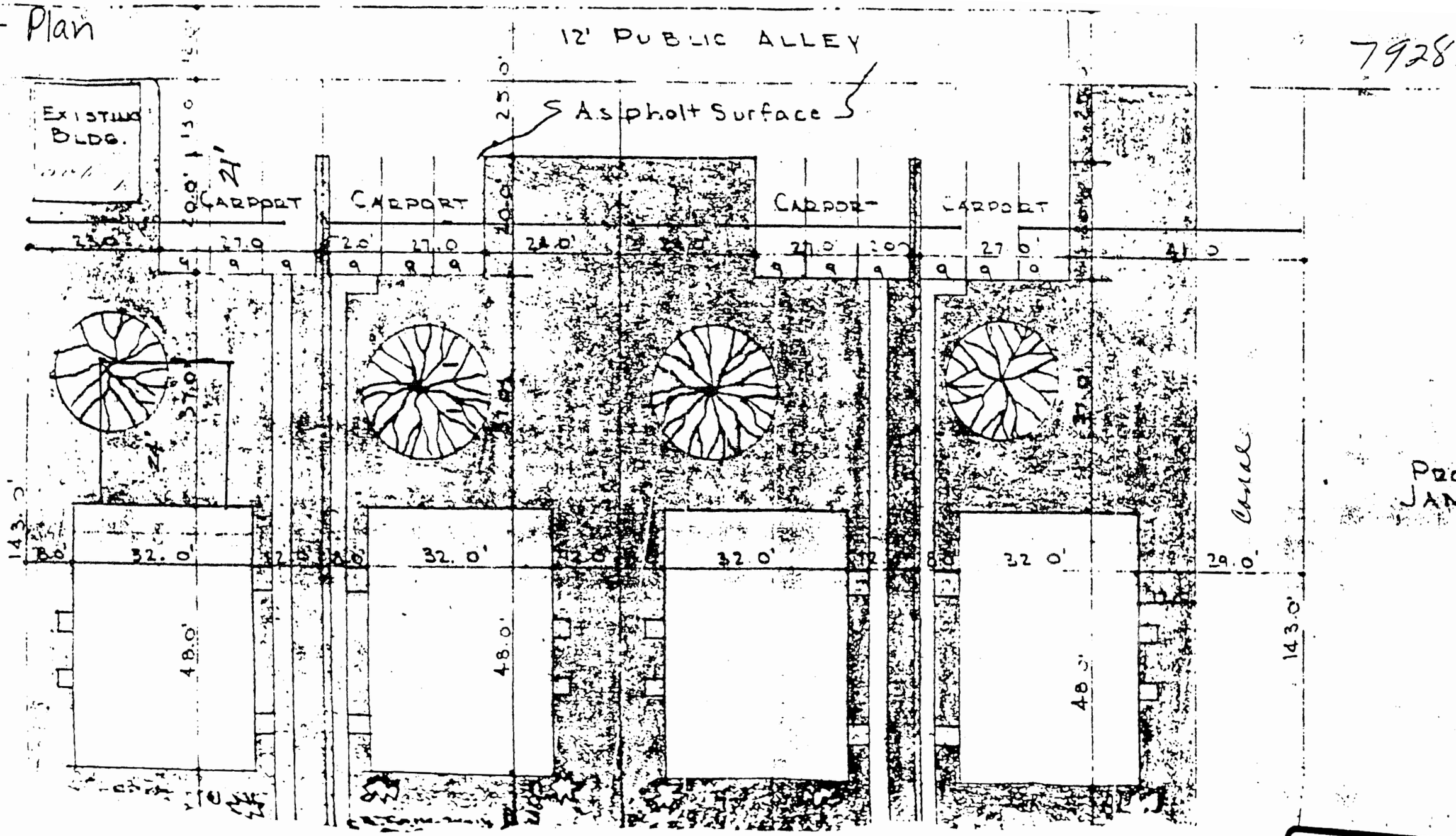
NOTE — If work is not marked approved, make corrections noted under remarks and call for another inspection before continuing work. Permit expires by limitation 120 days from date of permit if construction is not started.

_____

Building Inspector

APPENDIX 2

Plot Plan



DEFENDANT'S EXHIBIT D-31

BEFORE THE BOARD OF ADJUSTMENT, SALT LAKE CITY, UTAH

FINDINGS AND ORDER, CASE NO. 7928

REPORT OF THE COMMISSION:

This is an appeal by Gary J. Xanthos for a variance to legalize a single-family dwelling at 1610 West 900 South Street on a lot with a newly constructed duplex which causes the dwelling to not have frontage on a dedicated street, without the required side and rear yards, and without the required off-street parking in a Residential "R-2" District.

Gary Xanthos was present together with Richard Rappaport of 66 Exchange Place. Also present was Nona T. Cottle of 1616 West 900 South. Mr. Jorgensen explained that the single-family dwelling located on the rear portion of the lot was evidently built some time prior to 1927 and may have been a garage originally situated right on the alley. If it was built prior to 1927 it was built before there was any zoning. In 1974 a permit was taken out for four duplexes plus carports. The plans indicated an existing building on the lot but it was not marked as a dwelling. In looking at the plans, it was assumed that the building was an accessory building; but the building inspectors should have noted the problem when inspecting the property. It would be permissable to have an accessory building behind the duplexes but not a dwelling. If it would have been known that it was a dwelling the duplexes would never have been permitted to be constructed in front of it. Every building has to face on a dedicated street. Even if a building is situated way in the back of the lot with room for another dwelling, one could not be constructed in front of it because it would make either the building in the front illegal or the building in the rear illegal. Laura Landikusic presented the original plans and permits which indicate no dwelling on the lot at that time. The applicant who filed for the permit stated that the property was vacant. It was also noted that the carports were not constructed in accordance with the plans the building permit was issued on. The carports were to be detached directly off the alley but they are attached with the rear area blacktopped instead of landscaped. Mr. Rappaport explained that James Xanthos was the owner of the property at the time of construction but is now deceased. Mr. Rappaport stated that he understood that the building was a dwelling at the time the duplexes were constructed. He further stated that the dwelling provides low-income housing and is necessary for the economic feasibility of the duplex project. He further stated that he doesn't know of any complaints. Mr. Rappaport explained that if the deceased had known of the violation at the time he applied for the permit he could have arranged a different plan but the property was inspected by various inspectors and nothing was said. Mr. Rappaport feels that at the time of construction there was no intention of violating the law; a proper permit was obtained.

Nona Cottle who owns the adjacent property stated that as far as she knows the house was occupied when the duplexes were constructed but Mr. Xanthos did put in some new wiring and put new siding on the house although he told her he wasn't supposed to. She explained that the house has no foundation under it and was built from the inside out. She is not in opposition so much to the house being there but to the present occupants. They bring in a lot of traffic and noise. The blacktopping of the alley leading to the house was also discussed. It was brought out that there are many older homes in the City that don't have foundations but the house should be inspected for other violations. Mr. Xanthos stated that the tenant in the house could be changed if that would make it more acceptable to Ms. Cottle. It was also noted by the Board that there are some junk cars by the house that should be removed. Mr.

Xanthos was informed that he is responsible for the tenants and so he is responsible for getting the cars removed. Later in the meeting the various aspects of the case were reviewed. It was noted that certificates of occupancy were issued for the duplexes. The single-family dwelling has no rear yard and insufficient side yards. There is no record of a modified plan being filed for the alterations from the original plans for the duplexes. These problems should have been caught when the duplexes were inspected. The violation was brought to the attention of Building and Housing from another department in the City. The small house has to be either removed or legalized. Al Blair explained that the building inspector usually doesn't look at the permit, he refers to the plot plan. The Board felt that some of the blacktop in the rear yard should be removed and landscaping installed. It was noted that the carports are legal although they are not built in the configuration indicated on the original plans.

From the evidence before it and after further consideration, it is the opinion of the Board that the granting of the requested variance would be inimical to the best interest of the district and contrary to the spirit and intent of the Zoning Ordinance since the Board could find no unusual condition attached to this property which would deprive the owner of a substantial property right or use of his property, since the building permit indicated that there were no dwellings on the property and since no evidence was presented which would justify the requested variance.

IT IS THEREFORE ORDERED that the requested variance be denied and the violations corrected within 30 days.

Action taken by the Board of Adjustment at its meeting held Monday, February 26, 1979.

Dated at Salt Lake City, Utah, this 12th day of March, 1979.

Vice Chairman

Acting Secretary

10-9-12. Powers of board on appeal—Granting of and showing to be entitled to variance.—The board of adjustment shall have the following powers:

(1) To hear and decide appeals where it is alleged that there is error in any order, requirement, decision or determination made by the administrative official in the enforcement of this article or of any ordinance adopted pursuant thereto.

(2) To hear and decide special exceptions to the terms of the ordinance upon which such board is required to pass under such ordinance.

(3) To authorize upon appeal such variance from the terms of the ordinance as will not be contrary to the public interest, where owing to special conditions a literal enforcement of the provisions of the ordinance will result in unnecessary hardship; provided, that the spirit of the ordinance shall be observed and substantial justice done. Before any variance may be authorized, however, it shall be shown that:

(a) The variance will not substantially affect the comprehensive plan of zoning in the city and that adherence to the strict letter of the ordinance will cause difficulties and hardships, the imposition of which upon the petitioner is unnecessary in order to carry out the general purpose of the plan.

(b) Special circumstances attached to the property covered by the application which do not generally apply to the other property in the same district.

(c) That because of said special circumstances, property covered by application is deprived of privileges possessed by other properties in the same district; and that the granting of the variance is essential to the enjoyment of a substantial property right possessed by other property in the same district.

10-9-15. Judicial review of board's decision—Time limitation.—The city or any person aggrieved by any decision of the board of adjustment may have and maintain a plenary action for relief therefrom in any court of competent jurisdiction; provided, petition for such relief is presented to the court within thirty days after the filing of such decision in the office of the board.

FILMED

FILED IN CLERK'S OFFICE
Salt Lake County, Utah

FEB 10 1982

W. Sterling [illegible] and Dist. Court
BY [signature]
Deputy Clerk

Richard A. Rappaport
COHNE, RAPPAPORT & SEGAL
66 Exchange Place
Salt Lake City, Utah 84111
Telephone: (801) 532-2666
Attorney for Plaintiff

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

* * * * * * *

GARY J. XANTHOS, Plaintiff, vs. BOARD OF ADJUSTMENT OF SALT LAKE CITY, Defendant.	AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW Civil No. C-79-2426

* * * * * * *

The plaintiff having submitted Findings of Fact and Conclusions of Law, and the defendant having filed objections to the same, and counsel for both parties having met with the Honorable Kenneth Rigtrup, District Judge, on the 1st day of February, 1982, and the Court having determined to deny some of the objections and to grant others,

NOW, THEREFORE, the Court makes the following Amended Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. That the zoning ordinances of Salt Lake City were adopted in September of 1927.

2. Vern Jorgensen, Director of Planning and Zoning Department of Salt Lake City, at the Board of Adjustments hearing stated that the building had been there prior to 1927, the date of enactment of Salt Lake City zoning ordinances. This is reflected in the Board of Adjustment minutes.

3. The structure in question at 1610 West 900 South, Salt Lake City, Utah, was definitely in existence on April 21, 1942, and at that time it was occupied by a tenant and it had a weathered appearance and an appearance of being an old building.

4. Since at least April 21, 1942, the building has been occupied and used as a dwelling by a large number of tenants.

5. The continued existence of the dwelling, does not violate any safety requirements, nor does it impair access, nor does it adversely affect the health, safety or morals of the citizens of Salt Lake City.

6. That to comply with the decision of the Board of Adjustment and terms of the ordinances, the building would have to be either removed or used as storage or other auxiliary use requiring the elimination of its use as a dwelling. Such removal or changes to comply with strict enforcement serve no public interest in this case.

7. The proposed solutions of removal or change in use would eliminate a dwelling which is clearly habitable and which has and is being put to valuable use.

8. The solutions of modifying the building to some accessory or auxiliary use or demolition would result in no improvements or enhancement of safety requirements traffic circulation, air space, or the health, safety or morals of the community.

9. The gross square footage of the property would accomodate based upon minimum area requirements four duplexes and a single family dwelling if properly designed. However, the configuration and design on the subject property are not so properly designed or arranged, and therefore exceed the minimum requirements and lack yard areas required under ordinance.

10. There is in Salt Lake City a shortage of low income housing and the elimination of this dwelling which provides low cost housing is inconsistent with the public need and interest.

11. Elimination of this unit would cause a hardship to a tenant who would be deprived of a habitable dwelling at a relatively low cost of $150.00 per month.

12. Elimination of the unit also creates an economic hardship for the plaintiff in this action by imposing an unnecessary loss of $150.00 per month.

13. Continuation of the use as a dwelling in this case will not substantially affect the comprehensive plan of Salt Lake

City. Whereas strict enforcement will cause unnecessary hardship for tenant and owner, without furthering the general plan.

14. The granting of the variance is essential to the property owner to enjoy substantial property rights enjoyed by other property owners.

15. The plat submitted as part of the original building application for four duplexes by the plaintiff's deceased father, James Xanthos, showed that there was an existing building on the site. The application indicated that there was no dwelling or the site. The application did not indicate any accessory buildings on the site.

16. The original plans filed by James Xanthos with the Planning and Zoning Department cannot be found by the City. There were other deficiencies in the City record keeping pertaining to the building and its occupancy.

17. City building inspectors went to the site at least five times during the course of construction. The structure was observable to the inspectors, and one of the city inspectors Marvin Peguillan, observed the building and inquired about it bu none of the inspectors followed through with removing the building from use or availability for use as a dwelling.

18. The City issued certificates of occupancy for the fou duplexes. There was no evidence or record of any communicate conditions or stipulations restricting or concerning the use o removal of the structure as a single family dwelling.

19. Although the application made no reference to th single family dwelling, the inclusion of the building on the pla plan was sufficient disclosure by the applicant to place the Cit on reasonable notice to make further inquiry about the existenc and use of the building.

20. The Board of Adjustment erred in failing to grant variance in accordance with the provisions of 10-9-12(3) i that: (a) the variance in this case is not contrary to th public interest; (b) there are special conditions which wil result in unnecessary hardship if there is a literal enforcemen

of the provisions of the ordinance; and (c) in light of the fac that the spirit of the ordinance has been observed and there ha been substantial justice done.

21. There are special circumstances attached to th property covered by the application which do not generally appl to other properties in the same district including, but no limited to: (a) the age and occupancy of the dwelling; (b) th approval by the City of the development of the duplexes th issuance of certificates of occupancy for the duplexes; and (c) the failure of the City to inform James Xanthos that th dwelling would not comply with zoning ordinances thereby failin to give him the opportunity to redesign the layout for th duplexes in such a way as not to require the demolition of th dwelling.

22. The imposition of the strict enforcement of the zonin ordinances upon the petitioner is unnecessary in order to carr out the general purpose of the zoning plans and comprehensiv plan in the city.

CONCLUSIONS OF LAW

1. The Board of Adjustment wrongfully, arbitrarily, capri-ciously and unreasonably failed to grant the variance requestec by the plaintiff herein.

2. The variance should have been granted pursuant to the provisions of Section 10-9-12(3), Utah Code Annotated, 1953 as amended.

3. The provisions of Section 10-9-15 provide that any person aggrieved of a decision of the Board of Adjustment may maintain a plenary action for relief therefrom.

4. This court has jurisdiction with respect to such plenary action for relief.

5. Plenary action relief constitutes a complete review of the Board of Adjustment's decision by trial de novo and the court has the same power as the Board of Adjustments to review the facts.

6. The Board of Adjustment's decision was contrary to the evidence in the case and plaintiff is entitled to the variance requested as a matter of law and equity.

7. There is no public interest served in requiring the demolition of the subject building or its conversion into ar accessory building.

8. The failure to grant the variance is arbitrary, capricious and unreasonable and contrary to the health, safety and morals of Salt Lake City and its citizens.

DATED this 10 day of February, 1982.

BY THE COURT:

Kenneth Rigtrup
DISTRICT JUDGE

MAILING CERTIFICATE

The undersigned hereby certifies that a true and correc copy of the foregoing Amended Findings of Fact and Conclusions o Law was mailed, postage prepaid, on the 10 day of February 1982, to Judy F. Lever, Salt Lake County Attorney's Office, Cit and County Building, Salt Lake City, Utah 84111.